No. 07-103

In The Supreme Court of the United States

RICKIE L. REBER, TEX WILLIAM ATKINS, STEVEN PAUL THUNEHORST, AND C.R.,

Petitioners,

v.

STATE OF UTAH,

Respondent.

On Petition For A Writ Of Certiorari To The Utah Supreme Court

BRIEF OF THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT STATE OF UTAH AND IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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The Ute Indian Tribe of the Uintah and Ouray Reservation ("Ute Tribe") respectfully submits its brief in opposition to the Petition for Writ of Certiorari.

UTE CONSTITUTION, STATUTES, ORDINANCES, AND OTHER AUTHORITY

The following authorities are set forth verbatim in Appendix A:

Ute Tribe Constitution
Ute Tribe Ordinance 92-05
Ute Partition Act, 25 U.S.C. §§ 677-677aa
Cooperative Agreement between the Ute Tribe and State of Utah

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Ute Tribe, as recognized by the Department of the Interior ("Interior"), exercises all Tribal sovereign authority over hunting and fishing and other activities within the Uintah and Ouray Reservation ("Reservation"). The Ute Tribe has a substantial interest in the Petition for Writ of Certiorari because

[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of Court. Counsel for the Ute Tribe authored this amicus brief in its entirety. No person or entity other than the Ute Tribe contributed monetarily to the preparation of this brief. Sup. Ct. R. 37.6.

Petitioners seek to divest the Ute Tribe of the sovereign authority it has exercised over hunting and fishing on the Reservation for over 70 years. The Ute Tribe's opposition to the Petition is consistent with and supports that of Respondent State of Utah.

SUMMARY OF REASONS FOR DENYING THE PETITION

In petitioning for certiorari Petitioners present no conflict among the courts nor any other of the compelling reasons typically necessary to obtain certiorari. Sup. Ct. R. 10. Petitioners instead assert hunting and fishing rights which are contrary to settled law. Petitioners claim that the Uintah Band, not the Ute Tribe, possesses sovereign authority over hunting and fishing within the Reservation. Petition ("Pet.") at 4, 15. Petitioners have claimed to be affiliated with several different bands and tribes even in the course of this litigation, *infra* at 11-12, but currently claim to possess hunting and fishing rights on the Reservation as members of the Uintah Band, Pet. at 4-5, 15. The courts and Interior have uniformly rejected Petitioners' claim that the Uintah Band holds independent hunting and fishing rights. Those authorities hold that (i) the Uintah Band long ago "ceased to exist separately outside the Ute Tribe" and (ii) any argument that the "Uintah Band's hunting and fishing rights retain a separate existence and belong only to the Uintah Band is groundless." *See, e.g.*, *United States v. Von Murdock*, 132 F.3d 534, 541

(10th Cir. 1997); *Hackford v. Acting Phoenix Area Director*, 33 IBIA 144, 1999 WL 485041 (1999). The Utah Supreme Court's decision is in accord with the decisions of the federal courts and agencies. *State v. Reber*, 2007 WL 1189637 (Utah 2007).

Petitioners seek certiorari in the face of that authority by claiming that (i) courts holding the Uintah Band is not a separate entity do not address Petitioners' claim that the Ute Partition Act of 1954 ("UPA"), 25 U.S.C. §§ 677-677aa, expelled the Uintah Band from the Ute Tribe, (ii) courts have not determined the effect of the UPA on those born prior to the UPA and not listed on the UPA rolls, and (iii) there is an "urgent" "need for a clear interpretation of the UPA" because of "the potential for friction between the Uintah Band, the Ute Tribe, and the State of Utah." Pet. at 12. Certiorari should be denied. *First*, the language of the UPA, now more than 50 years old, and the substantial body of case law interpreting it, show that the UPA did not expel the Uintah Band. The Uintah Band remains part of the Ute Tribe. *Second*, Petitioners were born before the UPA was enacted and were properly not included on the UPA rolls because Petitioners were never members of the Uintah Band or the Ute Tribe.[2] *Third*, there is no "friction" to be resolved by the Court. The Ute Tribe and the State of Utah have a longstanding, successful

[2] Petitioners did not properly present this issue to the Utah Supreme Court; the Court did not rule on the issue; and Petitioners cannot now raise the issue on appeal. *See infra* at 12.

cooperative agreement governing their respective enforcement authority over hunting and fishing on Reservation lands and both sovereigns have jointly opposed Petitioners' claims.

REASONS FOR DENYING THE PETITION

I. PURSUANT TO WELL ESTABLISHED PRECEDENT, THE UINTAH BAND MAINTAINS NO EXISTENCE OUTSIDE OF THE UTE TRIBE.

A. The Uintah Band Merged Into The Ute Tribe.

In 1937 the "Ute Indians of the Uintah, Uncompahgre and Whiteriver Bands" adopted a tribal constitution and formed the Ute Tribe as authorized by the Indian Reorganization Act, 25 U.S.C. § 476. *See* Appendix 1-30 ("App."), Ute Tribe Constitution, at Preamble. The three bands collectively ratified the Ute Constitution by a vote of 347-12 and Secretary of the Interior Harold L. Ickes approved the Ute Constitution on January 12, 1937. App. 28-30. The Ute Constitution merged together the three bands.

> We, the Ute Indians of the Uintah, Uncompahgre and Whiteriver Bands hereafter to be known as the Ute Indian Tribe of the Uintah and Ouray Reservation, . . . do ordain and establish this Constitution of the Ute Indian Tribe of the Uintah and Ouray Reservation.

App. 1. The Ute Constitution assigns any rights held by the constituent bands, including the Uintah, to the Tribe as a whole. App. 11, Art. VI, § 4 ("Any rights and powers heretofore vested in the Tribe or bands of the Uintah and Ouray Reservation but not expressly referred to in this Constitution . . . may be exercised by the people of the Uintah and Ouray Reservation through the adoption of appropriate By-laws and constitutional amendments."). Under the Ute Constitution, the territory, rights, and jurisdiction of the three bands that joined to form the Ute Tribe are vested in the Ute Tribe and the individual bands retain no rights and powers outside the Ute Tribe. *Id.* at § 4.

B. The Uintah Band Has No Hunting And Fishing Rights Independent Of The Ute Tribe.

The Tenth Circuit Court of Appeals in *United States v. Von Murdock*, 132 F.3d 534 (10th Cir. 1997), rejected the same claims made here by Petitioners. In *Von Murdock*, children of individuals listed on the mixed-blood roll claimed to be affiliated with the Uintah Band and argued that they could hunt and fish on the Reservation. *Von Murdock*, 132 F.3d at 536, 539; Pet. at 3, 7, 9; Pet. App. 10. There, as here, they asserted that the Uintah Band possessed rights separate from the Ute Tribe. 132 F.3d at 539; Pet. at 4-5, 15. The Tenth Circuit rejected those claims as "groundless" and "untenable," *id.* at 541, because "the constitution [] makes clear":

1. "that the Bands ceased to exist separately outside the Ute Tribe,"

2. "that jurisdiction over what was formerly the territory of the Uintah Band was to be exercised by the Ute Tribe," and

3. "that the rights formerly vested in the Uintah Band were to be defined by the Ute Constitution and exercised by the Ute Tribe."

Id. Other federal courts have reached the same conclusion. *See Timpanogos Tribe v. Conway*, Civ. No. 00-734 at 10-19 (D. Utah 2005), *appeal dismissed*, Docket No. 05-4059 (10th Cir. 2005) (determining that Timpanogos Indians merged into the Uintah Band, concluding that the Uintah Band became part of the Ute Tribe, and rejecting the claim that those alleging to be Timpanogos members – a group that included three of the Petitioners – possess hunting and fishing rights independent of the Ute Tribe);[3] *Hackford v. Babbitt*, 14 F.3d 1457, 1461 (10th Cir.

[3] *Timpanogos Tribe v. Conway*, 286 F.3d 1195 (10th Cir. 2002), does not hold that members of the Uintah Band "made out a prima facie case that they possessed the right to hunt and fish on the Reservation." Pet. at 6-7. *Conway*, a decision on interlocutory appeal, addressed only "issues of Eleventh Amendment immunity and subject matter jurisdiction." 286 F.3d at 1199. As is clear from the District Court's 2005 decision, the claims of the Timpanogos Tribe did not survive summary judgment. *Timpanogos Tribe v. Conway*, Civ. No. 00-734 at 2, 18 (holding that plaintiffs failed to support their claim to hunting and fishing rights on the Reservation.).

1994) (describing the evolution of events "from loosely-knit bands to unified Ute Tribe"). Interior's case law is in accord, *Hackford*, 33 IBIA at 146 ("the rights originally vested in the Uintah Band [were] transferred to the Ute Indian Tribe"), as is the Utah Supreme Court's, *Reber*, at *4-5 ("the Uintah [Band] no longer has a separate existence apart from the Ute Tribe").

C. The Ute Partition Act Did Not Expel The Uintah Band.

Petitioners claim the UPA expelled the Uintah Band from the Ute Tribe. Pet. at 5, 15. The UPA did not expel the Uintah Band. Cases holding that the Uintah Band has no separate existence from the Ute Tribe discussed the UPA at length, but did not find that the UPA expelled the Uintah Band. *Von Murdock*, 132 F.3d at 535-40, 541-43. Nor does Petitioners' expulsion claim square with the language or intent of the UPA.

Congress enacted the UPA in 1954 at the insistence of tribal members to "provide for the partition and distribution of the assets of the Ute Indian Tribe . . . and for the termination of Federal supervision over . . . the mixed-blood members of said tribe." 25 U.S.C. § 677; *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 143 (1972) ("[The UPA] was the result of proposals initiated by the tribe itself."). The UPA first divided the Ute Tribe into two groups of individuals: "Full-blood" Indians, defined as

"a member of the tribe who possesses" a certain quantum of "Ute Indian blood and [] total Indian blood," 25 U.S.C. § 677a(b), and "Mixed-blood" Indians, defined as "a member of the tribe" with a lesser quantum of Ute Indian and total Indian blood *and* those full-blood individuals who choose to be classified as "mixed-bloods," *id.* at 677a(c). Inclusion on the mixed-blood roll was not dependent upon band affiliation, §§ 677a, 677b, 677c, and 677g (defining "mixed-blood" and setting out the procedure for inclusion on the mixed-blood roll), and the courts have so held, *Hackford*, 14 F.3d at 1462 ("the roll makes no reference to band affiliation"). After the distribution of tribal assets, the Indian status of each individual on the mixed-blood list was terminated. 25 U.S.C. § 677v ("declaring that the Federal trust relationship to such individual [each individual on the mixed-blood list] is terminated"). To the extent that the mixed-blood individuals were required to act as a group after termination, they were to be represented, not by a newly created Uintah Band, but by the Affiliated Ute Citizens group ("AUC") and later by the Ute Distribution Corporation ("UDC"). *Affiliated Ute Citizens*, 406 U.S. at 143-44 (the Act provided for "the selection of authorized representatives" for the mixed-bloods, the AUC "was the product of this organizational power" and the "AUC itself created . . . [the] UDC").

Petitioners do not cite any language in the UPA or any other authority that suggests the UPA "expelled" the Uintah Band and "rendered the Uintah Band independent from the Ute Tribe." Pet. at 5, 15.

That is because there is none. The UPA terminated Indian status for certain individuals, not bands. *Affiliated Ute Citizens*, 406 U.S. at 134-35. In the face of this authority Petitioners resort to sleight of hand. They assert that "the Uintah Band has always been known throughout the Reservation as the 'Mixed-bloods,'" implying that the Ute Partition Act expelled the Uintah Band because it terminated the Indian status of "mixed-bloods." Pet. at 4. Their unsupported assertion is contrary to the plain language of the UPA. "Mixed-blood" is defined in the Act by reference to individual blood quantum and choice, with no reference to band membership.[4] Petitioners themselves admit that hundreds of Uintahs remained members of the Ute Tribe after termination of the Indian status of mixed-blood individuals in 1961. Pet. at 5 (acknowledging that over 200 Uintahs, roughly 30% of Uintah Band descendants, remained Ute Tribe members). Not only did Uintah Band descendants remain Ute Tribe members, but also individuals of Uncompahgre and Whiteriver Band derivation appeared on the official mixed-blood roll and their status as Indians was terminated. While the Indian status of many Uintah individuals was terminated,

[4] Rather than referring to the Secretary of the Interior's official rolls, Petitioners append to their brief an unofficial roll prepared nearly ten years later. *See* Pet. App. 67-98. That unofficial roll specifically states that "band identification [was] added," making clear that the official roll includes no band affiliation identification. *See* Pet. App. 67; 21 Fed. Reg. 2208-2220.

that of many others was not and the Uintah Band remains one of the three constituent Bands of the Ute Tribe. There is no colorable basis for the "Uintah Band expulsion" claim where the UPA makes no reference to bands and where Uintah Band descendants remain Ute Tribe members after termination of the Indian status of "mixed-blood" individuals. Petitioners' contention that the UPA reconstituted the Uintah Band as a group distinct from the Ute Tribe is inconsistent with the UPA, settled judicial authority, and the historical facts on which they are based. It provides no ground for certiorari.

II. PETITIONERS ARE NOT MEMBERS OF THE UINTAH BAND, ARE NOT MEMBERS OF THE UTE TRIBE, AND ARE NOT INDIANS.

A. Petitioners Are Not Members Of The Uintah Band.

Given that the Uintah Band was one of the three bands that joined in forming the Ute Tribe and that the rights of the Uintah Band are now exercised by the Ute Tribe as a whole, *supra* at 4-10, the Ute Tribe has sole authority to make the membership determination whether Petitioners are Uintah Band members. That is so because the courts have consistently held that "a tribe has the *complete authority* to determine all questions of its own membership," *Martinez v. Southern Ute Tribe of the Southern Ute Reservation*, 249 F.2d 915, 920 (10th Cir. 1957) (emphasis added), and "[a] tribe's right to define its own membership for tribal purposes has long been recognized as

central to its existence as an independent political community," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). Congress specifically endorsed the Ute Tribe's control over its membership determinations in the UPA. *See* 25 U.S.C. § 677d ("New membership in the tribe [after the publication of the UPA rolls] shall [] be controlled and determined by the constitution and bylaws of the tribe and ordinances enacted thereunder."). The Ute Tribe maintains precise census records reflecting Ute Tribe membership and derivation from each of the Ute Tribe's three constituent bands. Those official records reflect that Petitioners are not now and never have been members of either the Ute Tribe or the Uintah Band.

Petitioners' claim to be members of the Uintah Band is in any event suspect and contrary to their own prior representations. At Petitioner Reber's initial appearance before the state district court his counsel disavowed any association of Petitioners with the Uintah Band: "These aren't Uintah Utes. . . . They're not Uintah Utes, they're Timpanogos, . . . Timpanogos are not Uintah Utes. We're not making any claims as Uintah Utes." R. 578: 5-6. At the same time they were disclaiming any affiliation with the Uintah Utes in the Utah state courts, Petitioners alleged membership in the "Uinta Band of Utes" in litigation before the federal courts in the District of

Columbia.[5] R. 144. Petitioners later filed with the state district court below a "Clarification of Facts" alleging that they were "Indian[s] of Utah Territory" and that "the Shoshone Indians of Utah Territory are Indians for whom the reservation was set apart." R. 125, 126.

B. Petitioners Are Not Members Of The Ute Tribe.

Petitioners argue that their Indian status was wrongfully terminated by the UPA because they were born prior to the UPA but did not appear on the UPA rolls.[6] Pet. at 4-5, 16. The individuals listed on those rolls, however, were Tribal members prior to the UPA. *See* 25 U.S.C. § 677g. Petitioners failed to raise this claim below, but even if they had, the evidence shows that they never qualified for membership in the Tribe. Petitioners stipulated that they are 1/16 Indian by heritage, *see infra* at 14-15, and that blood quantum was never sufficient for membership under Tribal law. Beginning in 1938, the Tribe required 1/8 Ute blood quantum for membership and the requirement steadily increased to the current requirement of 5/8

[5] Petitioners Atkins, Thunehorst, and Reber also represented themselves as belonging to the "Timpanogos Tribe" in litigation against the State of Utah. *See supra* at 6.

[6] Petitioners did not properly present this issue to the Utah Supreme Court and that Court did not rule on the issue. Consequently, the issue is not properly before this Court. *See, e.g.*, *Adams v. Robertson*, 520 U.S. 83, 86 (1996).

Ute blood quantum. Thus, while Petitioner Reber's mother met the 1/8 blood requirement and was therefore listed on the Tribal rolls before termination, Mr. Reber and the other Petitioners were never members and never appeared on the Tribal rolls. Consequently, they properly did not appear on the UPA rolls.

In any case, the effect of the UPA on individuals, like Petitioners, who are the children of those listed on the mixed-blood roll is settled. *First*, Ute Tribe membership requirements specifically preclude from membership descendants of individuals listed on the mixed-blood roll. *See* App. 34, Ordinance 92-05, Art. IV, Sec. C(2); *Von Murdock*, 132 F.3d at 536 ("Nor can the children of a terminated mixed-blood claim membership in the tribe through their mixed-blood parent.") (quotation omitted). *Second*, as descendants of mixed-blood individuals Petitioners are not entitled to rights granted under federal statute or to the rights of tribal members. 26 Fed. Reg. 8042 ("all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable [to those listed on the mixed-blood roll] . . . and the laws of the several states shall apply . . . in the same manner as they apply to other citizens within their jurisdiction"); *Von Murdock*, 132 F.3d at 538-539, 540 ("The right of each individual to participate in the enjoyment of [tribal hunting and fishing rights] depended upon tribal membership" and descendants of the mixed-blood individuals terminated by the Ute Partition Act possess no right to hunt and

fish on the Uintah and Ouray Reservation) (quoting *Gritts v. Fisher*, 224 U.S. 640, 642 (1912)). *Third*, such individuals are subject to state criminal jurisdiction. *Gardner v. United States*, 25 F.3d 1056, 1994 WL 170780 at *3 (10th Cir. 1992) (unpublished) ("[the descendants of individuals listed on the mixed-blood roll are] subject to state criminal jurisdiction").

C. Petitioners Are Not Indians.

The Utah Supreme Court properly concluded that Petitioners can not meet the ordinary tests of Indian status. To determine Indian status for criminal jurisdiction purposes, courts utilize the two-part test set forth in *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846). That test examines whether an individual (i) "has a significant degree of Indian Blood" and (ii) "is recognized as an Indian by a tribe or society of Indians or by the federal government." *See Utah v. Perank*, 858 P.2d 927, 932 (Utah 1992). Heritage derived from ancestors whose Indian status has been terminated is excluded from consideration in this examination. *See, e.g., St. Cloud v. United States*, 702 F. Supp. 1456, 1462-66 (D.S.D. 1988) ("Case law confirms the conclusion that the termination act ends the federal trust relationship with St. Cloud and subjects him to state jurisdiction.").

The Utah Supreme Court concluded that, on the basis of Petitioners' stipulated facts, they are not Indians under the *Rogers* test. Petitioners stipulated that their blood quantum was $^{1}/_{16}$ Indian and $^{15}/_{16}$

non-Indian. R. 364. That is not a significant quantity of Indian blood under any case, even setting aside the fact that the Indian status of the only person through whom each claims Indian blood was terminated by the UPA. R. 362 (citing cases). When, as the case law requires, that blood quantum is disregarded, Petitioners do "not have any Indian blood for the purposes of the *Rogers* analysis." R. 361. Nor, as the Utah Supreme Court held, have Petitioners been "recognized" as Indians by either the federal government or a tribe or society of Indians. *Reber*, at *4-5. Petitioners acknowledge that they are not members of any tribe recognized by the United States; Petitioners have claimed and disclaimed membership and affiliation with any number of Indian groups, *see supra* at 11-12; and they have provided no support for their present claim that they are Uintah Band members.[7] They are self-proclaimed Indians, "recognized"

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[7] When pressed by the trial court below, Petitioners refused to offer even a name by which the tribal entity to which they supposedly belong is recognized:

The Court:	[D]o you claim that he [Mr. Reber] has been recognized by an association or tribe?
Mr. Humiston:	Yes.
The Court:	What association or tribe do you –
Mr. Humiston:	The Indians of Utah Territory associated with the Uintah band.
The Court:	Is there a specific group or organization which calls themselves the Indians of Utah Territory?

(Continued on following page)

as Indians by no one other than themselves, and certainly not by the federal government or any tribe or society of Indians.

III. PETITIONERS SEEK TO DISRUPT THE SETTLED JURISDICTIONAL FRAMEWORK.

The Ute Tribe and the State of Utah have for years cooperated in implementing the jurisdictional rules set out by this Court in *United States v. Montana*, 450 U.S. 544 (1981) and *Hagen v. Utah*, 510 U.S. 398 (1994). The Ute Tribe and State of Utah have signed a cooperative agreement regarding

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Mr. Humiston:	All of them. Under that title I'm aware there are – there is – the actual relevant inquiry on this, the general for determining whether a body of people constitutes an Indian tribe are set forth in 25 – Part 83 of the Code of Federal Regulations. . . .
The Court:	Well, my – I take from what you said that there is no organization that calls themselves the Indians of Utah Territory . . . is that right?
Mr. Humiston:	No. . . . it is an organization.
The Court:	What is the name of the organization?
Mr. Humiston:	I refer to them as the Indians of Utah Territory. That's the only name that I know would apply to all of them, but I am not in a position to officially give them that name. That's simply who they are.

R. 580:18-20.

jurisdiction over hunting and fishing on the Reservation. App. at 78-94. Tribal and State authorities agree that Petitioners are subject to state jurisdiction because they are non-Indians hunting illegally on land held in fee by non-Indians. The "friction" upon which Petitioners seek certiorari simply does not exist. Pet. at 12. Petitioners' claimed need to bring an end to over 50 years of "fractious" and "protracted" litigation is similarly without support.

CONCLUSION

For the foregoing reasons the Ute Tribe requests the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted this 17th day of September, 2007.

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